

United Parcel Service, Inc. and David Dunning. Case
7-CA-41784

June 14, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 26, 2000, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order, except that the attached notice should be substituted for that of the administrative law judge.³

In his decision, the judge found that the Respondent violated Section 8(a)(1) of the Act, inter alia, by orally promulgating an overly broad no-distribution rule prohibiting employees from distributing literature in non-work or mixed-use areas during nonworktime. The judge also found that the Respondent violated Section 8(a)(1) by discriminatorily enforcing its existing written no-distribution rule when it did not allow employee David Dunning to distribute the *Convoy Dispatch*, a Teamsters for a Democratic Union publication, in the Respondent's package car warehouse area during the prestart worktime. In adopting this finding, we rely on the fact that the Respondent routinely permitted drivers to pass out contest forms, raffle tickets, and golf and fishing flyers in that location. We do not, however, rely on the drivers' solicitation of signatures on get well cards or the collection of money for the purchase of flowers or other items. In our view, such conduct is more in the nature of "solicitation" rather than "distribution" as was engaged in by Dunning.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, the Respondent, in its brief, asserts that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

² In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by its prohibiting the distribution of union-related materials, Member Hurtgen relies solely on the judge's finding that the Respondent discriminatorily enforced its no-distribution rule. See his dissent in *United Parcel Service*, 327 NLRB 317 (1998).

³ In his decision, the judge inadvertently omitted the cease-and-desist provision in the notice. We shall issue a new notice to conform to the Order.

We also find no merit to the Respondent's contention that the distribution of the *Convoy Dispatch* was a potential littering hazard in the facility. The record shows that the Respondent regularly permitted drivers to read non-union-related newspapers and that the periodicals did not cause any disruption to the Respondent's daily operation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Parcel Service, Inc., Saginaw, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice should be substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT enforce our no-distribution rule in the package car warehouse area prior to the starting time of the package car drivers.

WE WILL NOT discriminatorily enforce our no-distribution rule against employees who are distributing union or other protected publications.

WE WILL NOT threaten employees with progressive discipline including termination if they distribute literature in nonwork or mixed-use areas during nonworktime.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

UNITED PARCEL SERVICE, INC.

Richard F. Czubaj, Esq., for the General Counsel.
Carey A. DeWitt, Esq. and *Joseph M. Rogowski II, Esq.*, of
Detroit, Michigan, for the Respondent.
Barbara Harvey, Esq., of Detroit, Michigan, for the Charging
Party.

DECISION
STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on September 28 and 29, 1999,¹ in Detroit, Michigan, pursuant to an order consolidating cases and amended consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on July 26. The complaint, based on original charges in Cases 7-CA-41784 and 7-CA-41964² filed by David Dunning, an individual, alleges that United Parcel Service, Inc. (the Respondent or the Employer) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent orally promulgated an overly broad no-distribution rule prohibiting employees from distributing literature in nonwork or mixed-use areas during nonworktime, discriminatorily enforced its existing written no-distribution rule and threatened to discharge an employee if he distributed literature in nonwork or mixed-use areas during nonworktime or if he distributed literature during nonworktime in areas in which other employees are permitted to distribute literature during nonworktime.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the interstate and intrastate transportation of goods and has maintained its principal office and place of business in Atlanta, Georgia. Respondent maintains other facilities through out the United States, including one in Saginaw, Michigan. It annually derives gross revenues in excess of \$50,000 for the transportation of freight between and among the various States of the United States. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of the employees in the unit with regard to wages, rates of pay, hours of employment, and other terms and conditions of employment. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from August 1, 1997, through July 31, 2002.

¹ All dates are in 1999 unless otherwise indicated.

² The General Counsel's motion to sever Case 7-CA-41964 from Case 7-CA-41784 was granted at the hearing without opposition from the parties. Accordingly, this decision will only address the issues in Case 7-CA-41784.

The subject case is strikingly similar to a prior case considered by the Board in *United Parcel Service*, 327 NLRB 317 (1998).³ In that case, the Board affirmed the judge's finding that the Respondent violated Section 8(a)(1) of the Act by enforcing its no-distribution rule in the check-in area and by discriminatorily applying the rule against David Dunning in the check-in area. The judge found that during the hour before the drivers' starting time at 8:30 a.m., the prestart period, the drivers openly read, lounge, engage in social conversation, and generally use the check-in areas as assembly and waiting rooms. She also found that while supervisors occasionally give some instructions or supplies to drivers in the check-in areas during the prestart period, this is the exception and not the rule. The judge concluded that the check-in areas are nonwork areas, or at most, mixed-use areas. The Respondent, therefore, was not privileged to ban distributions in such areas.

B. The Facts

The Saginaw facility routinely handles approximately 29,000 packages daily that are delivered or picked up by its 93-package car drivers. The package car drivers are the heart and sole of the business and officially begin their paid workday at 8:40 a.m. when they attend a mandatory precommunication meeting before departing the facility to commence delivery of their packages. Prior to the package drivers' arrival at work, part-time loader employees are charged with removing the packages from large trailers before placing them on one of four conveyor belts. The conveyor belts run through the middle of the facility and enable the package cars to be backed up to ramps on both sides of the belts. Thereafter, the packages are off-loaded by the part-time loaders into the individual package cars (Jt. Exh. 1, depicts the conveyor belts and an outline of the facility).

A number of drivers and supervisors arrive for work as early as 7:30 a.m. While some drivers use the locker rooms, they eventually proceed to office complex A to clock-in and obtain their hand held diads.⁴ Thereafter, drivers that arrive before 8:40 a.m. are free to talk, read newspapers and magazines, drink coffee, smoke cigarettes, or stand around until their assigned starting time. The evidence discloses that some drivers congregate around office complex A, others go to the check-in area while a large number of drivers lean on the front bumpers of their package cars or mill around in groups in the package car warehouse area,⁵ while waiting to commence work. It is during this period that all of the drivers are together at the facility before departing to commence their package deliveries. During this prestart period, drivers pass around such items as entry blanks for fishing and bowling tournaments, horseshoe contests, golf outings, and sign get well cards or take up collections to purchase flowers or other items. Package drivers return to Respondent's facility anytime between 4:30 to after 8 p.m., upon the completion of their delivery runs.

³ That case is presently pending appeal in the United States Court of Appeals for the Sixth Circuit.

⁴ A diad is a hand held computer that keeps track of deliveries and the drivers' time throughout the day. Although the drivers' clock-in on their arrival at work, they do not officially get paid until they start work at 8:40 a.m. Before 8:40 a.m., the drivers are on nonworktime.

⁵ The package car warehouse area, depicted on Jt. Exh. 1, is the point between the front bumpers of the package cars to the wall area in front of office complex A, and stretches from circle (balloons) 1 to 17.

The Respondent utilizes the package car warehouse area for employer sponsored events such as the United Way Campaign and its Founders Day celebration.⁶ Refreshments are placed on tables in the package car warehouse area for which employees are encouraged to attend and participate.

The Respondent maintains a written no-solicitation rule that provides, in pertinent part, as follows:⁷

1. No employee shall solicit or promote support for any cause or organization during his or her working time or during the working time of the employee or employees at whom such activity is directed.
2. No employee shall distribute or circulate any written or printed material in work areas at any time, or during his or her working time or during the working time of the employee or employees at whom such activity is directed.

David Dunning is a package car driver who has been employed for 25 years by the Respondent. Since about 1980, Dunning has also been a steward for the Union. Commencing in July 1997 Dunning distributed without supervisory interference during the prestart period in the locker room, check-in area, and the package car warehouse area, copies of a newspaper called the *Convoy Dispatch*,⁸ a publication of the Teamsters for a Democratic Union (TDU). Likewise, during the 7:30 to 8:40 a.m. time period and in the same areas, Dunning distributed collective-bargaining updates and copies of the parties' collective-bargaining agreement to fellow employees and supervisors.

On February 11, Dunning was in the process of distributing copies of the *Convoy Dispatch* in the package car warehouse area during the prestart period, when Supervisor Russ Spaulding apprised him that he was not permitted to distribute the newspaper in that area. Dunning told Spaulding that he previously distributed the newspaper in the warehouse area and was never told by anyone in supervision that he could not distribute it. Accordingly, he would continue to do so. Spaulding informed Facility Business Manager Brian Haack that Dunning refused to cease distributing the newspaper in the package car warehouse area. Haack checked with his Division Manager Dan Klinkner, who informed Haack that Dunning was not permitted to distribute the newspaper in the package car warehouse area. Haack then proceeded into the package car warehouse area and informed Dunning that he could not distribute the newspaper in that area. Although Dunning disagreed with

Haack's instructions, he ceased distributing the newspaper and has refrained from doing so to the present day. Later that day, Dunning had a conversation with Klinkner who told him that he would be restricted to the locker room, the stairs outside the locker room and the parking lot for the distribution of the *Convoy Dispatch*. In a later conversation with Haack sometime in March 1999, Dunning was informed that he could also distribute the *Convoy Dispatch* in the check-in area.

On February 18 Dunning was in Lansing, Michigan, attending a state board grievance meeting on behalf of another employee. During a recess, Labor Manager Tim Hoy and Klinkner called Dunning into the hallway. Hoy informed Dunning that he was not to distribute the *Convoy Dispatch* in the check-in or package car warehouse area or he would be subject to progressive discipline up to and including termination.

C. Respondent's Enforcement of its No-Distribution Rule

In this case, there is no question that the *Convoy Dispatch* newspaper is entitled to protection of Section 7 of the Act. It primarily contains articles about current workplace issues and commentary about the Union's efforts to represent employees with respect to those issues. Accordingly, I find that the *Convoy Dispatch* is entitled to protection of Section 7 of the Act. *McDonnell Douglas Corp.*, 210 NLRB 280 (1974).

The Respondent argues that it can lawfully ban distribution of the *Convoy Dispatch* in the package car warehouse area because it is a work area during the entire course of the day including the prestart period. In support of this contention, the Respondent cites record evidence that during the prestart period work is regularly performed by employees and supervisors. In this regard, Respondent argues that porters pick up trash and collect soiled uniforms, the on duty mechanic attends to minor repairs on the package cars, and part-time loaders regularly transport incompatible packages on carts throughout the package car warehouse area.⁹ Additionally, when conducting inspections, the safety committee walks through the package car warehouse area, and the director of human resources conducts an orientation for prospective employees in that area. Further, the Respondent points out that supervisors and employees regularly talk about work-related issues during the prestart period in the warehouse area.

The evidence shows, however, that during the prestart period the package car drivers are not on the clock and they do not perform work. Dunning credibly testified that while some employees ask supervisors work related questions during the prestart period, it is undertaken because this is the only portion of the day that the drivers and the supervisors are together for a finite period of time. Correspondingly, the parties' collective-bargaining agreement does not require an employee to respond to a supervisor's work related question during the prestart period. Although Dunning acknowledges that some drivers have performed work in and around their package cars during the prestart period, he has discouraged this practice and has cautioned those drivers that the collective-bargaining agreement prohibits such conduct. Dunning and employee Marti Murphy credibly testified that during the prestart period drivers regularly drink coffee, read the newspaper, and generally mill around and utilize the package car warehouse area as an assem-

⁶ The Respondent permits employees to make contributions to the numerous charities under the United Way umbrella. Founders Day is a yearly event on August 27 to celebrate the founding of the Employer.

⁷ The rule has been posted on the bulletin board in the check-in area since approximately June 1997. It is found at the bottom portion of a large poster board that contains other notices to employees such as "Employee Polygraph Protection Act," "Family and Medical Leave Act," "Federal Minimum Wage Information," "Policy on Sexual Harassment," and "Equal Employment Opportunity Information." The portion concerning the no-distribution rule is in small print and prohibits the distribution of written or printed material in work areas at any time. Both employees David Dunning and Marti Murphy credibly testified that they were not aware that the rule was posted in the check-in area. I conclude that the no-distribution rule was not widely publicized or disseminated and is misleading and confusing to employees in that it is captioned under a "No Solicitation Rule" heading and is found at the bottom in small print among a number of other notices to employees (R. Exh. 5).

⁸ The *Convoy Dispatch* is distributed 9 months during the year.

⁹ Packages in excess of 70 pounds that will not fit on the conveyor belts are classified as incompatibles. These packages are individually loaded on the package cars by the part-time loaders.

bly area. Additionally, supervisors often join employees during this period and drink coffee while conversing about nonwork-related matters. This was confirmed by the testimony of Supervisors Barry Bonadurer, John Spangler, Richard Prevost, and Klinkner.

In regard to the Respondent's position that certain work functions are ongoing in the package car warehouse area during the prestart period, Supervisors Klinkner, Spangler, and Haack testified that the package car drivers do not interfere with the work of the porters, mechanics, or the movement of incompatible packages. In this regard, the porters pick up trash between 7 and 7:40 a.m., the mechanics, according to Spangler, work very infrequently during the prestart period, and the incompatible packages are placed on a cart that is pushed to the location of the package car. Likewise, the four employee members of the safety committee inspect the entire facility only twice a month including a walk through the package car area while the orientation of prospective employees takes place once or twice a month between 7 and 8 a.m.

The Board has long held that an employer may lawfully prohibit employees from distributing literature in work areas in order to prevent the hazard to production that could be created by littering the premises. *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962). However, the Board has also held, with court approval, that this rule does not apply to a mixed-use area. *Transcon Lines*, 235 NLRB 1163, 1165 (1978), *affd.* in pertinent part 599 F.2d 719 (5th Cir. 1979) (employer failed to meet burden of establishing that distribution, which took place in area used for recreation as well as work, occurred in a work area or during worktime); *Rockingham Sleepwear*, 188 NLRB 698, 701 (1971) (sewing area which is work area for greater portion of day, but used as lunch area during lunch period, not "work area" within meaning of *Stoddard Quirk* for duration of lunch period, but lunchroom where distribution may not lawfully be prohibited). The concerns for protecting the production process which were at issue in *Stoddard Quirk* do not rise to the same level when an employer compromises a work area by permitting nonwork use of it.

Based on the forgoing, I find that the package car warehouse area is used as a nonwork or, at most, mixed-use area between 7:30 a.m. and the drivers official start time of 8:40 a.m. However, it is a nonwork area for the package car drivers who are in a nonwork status during that period.

Therefore, I find that the Respondent violated Section 8(a)(1) of the Act by enforcing its no-distribution rule in the package car warehouse area during the prestart period.

D. The Enforcement of the Distribution Ban Against Dunning

There is no dispute that on February 11 Respondent prohibited Dunning from distributing the Convoy Dispatch in the package car warehouse area during the prestart period. Likewise, I find that on February 18 Labor Manager Hoy apprised Dunning that if he did not cease distributing the Convoy Dispatch in the package car warehouse area during the prestart period, he could be subject to progressive discipline including termination.

The record evidence shows that the drivers routinely distribute such materials as fishing contest, horseshoe, golf, and bowling flyers, obtain signatures on get well cards, or collect money for flowers in the package car warehouse area during the

prestart period.¹⁰ There is no evidence showing that Respondent's written no-distribution rule was enforced against the drivers who engaged in the above activities in any way.¹¹ However, Dunning was informed he would be subject to progressive discipline including termination if he continued to distribute the Convoy Dispatch under the same conditions and in the same area under which the other materials are distributed.

In the particular circumstances of this case, I fully credit the testimony of Dunning and Murphy, that Supervisors Prevost and Spangler and Business Manager Haack were present when contest forms, raffle tickets, and get well cards were openly and routinely distributed in the package car warehouse area during the prestart period. *Schaeff, Inc. v. NLRB*, 113 F.3d 254 (D.C. Cir. 1997) (Board had adequate support for inference that management knew of employees' union activities because there was evidence that employees openly talked about the activities at work and a manager regularly mingled with the employees when they were working).

Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act by discriminatorily enforcing its no-distribution rule against Dunning for distributing the Convoy Dispatch and threatening him with discipline for engaging in protected concerted activity.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly broad no-distribution rule prohibiting employees from distributing literature in nonwork or mixed-use areas during nonworktime. The Respondent further violated Section 8(a)(1) of the Act by discriminatorily enforcing its existing written no-distribution rule and by threatening employee David Dunning with progressive discipline including termination for distributing literature in nonwork or mixed-use areas during nonworktime.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

¹⁰ I specifically credit the testimony of Dunning, which was sincere and forthright, that Supervisors Haack, Prevost, and Hardin were present during the prestart period when the bowling flyers were distributed in the package car warehouse area (G.C. Exh. 3). Likewise, I credit Murphy's testimony that bowling, fishing, and horseshoe flyers were routinely distributed in the package car warehouse area during the prestart period and that he observed supervisors in the immediate area including Spangler.

¹¹ Haack testified that all supervisors have the authority to enforce Respondent's rules.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

ORDER

The Respondent, United Parcel Service, Inc., Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing its no-distribution rule in the package car warehouse area prior to the starting time of the package car drivers.

(b) Disparately enforcing its no-distribution rule against employees with respect to their distribution of protected publications.

(c) Threatening to take progressive discipline including termination against employees for distributing literature in non-work or mixed-use areas during nonworktime.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Saginaw, Michigan, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided

¹³ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the

by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."